APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,315

Aug. 7, 1963

BUILDERS CORPORATION OF AMERICA, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California
Northern Division

Before: CHAMBERS, BARNES, and KOELSCH, *Circuit Judges*

BARNES, *Circuit Judge*:

Chapter 171 of Title 28, United States Code, and specifically Section 2674 thereof, provides in material part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."

Section 2680(a) of Title 28, United States Code, provides certain exceptions to the liability created by the entire Chapter 171 of Title 28, United States Code. Section 2680 reads, in material part:

> "The provisions of this chapter . . . shall not apply to—
>
> (a) Any claim . . . based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

By virtue of the same section (2680), if such discretionary function or duty is involved, no jurisdiction exists in the federal courts under § 1346(b) of Title 28, United States Code, to hear this claim.[1]

The waiver of the sovereign right created by the statutes above mentioned, did not create new causes of action where none existed before; nor did it foist novel and unprecedented liabilities upon the federal government. *National Mfg. Co.* v. *United States*, 8 Cir., 1954, 210 F. 2d 263, certiorari denied, 347 U.S. 967.

The rule of liberality of construction, in favor of the exceptions, applies. *Mid-Central Fish Co.* v. *United States*, W.D. Mo. 1953, 112 F. Supp. 792, 8 Cir. 1954, 210 F. 2d 263, certiorari denied, 347 U.S. 967.

The exceptions are not to be nullified through judicial interpretations, since Congress clearly delineated the areas in which it did not intend to forfeit its immunity from suit. *Toledo* v. *United States*, D. Puerto Rico 1951, 95 F. Supp. 838; *Hernandez* v. *United States*, D. Hawaii 1953, 112 F. Supp. 369.

Acts of a governmental nature were never intended to be within the scope of the liability created. *Dalehite* v. *United States*, 1953, 346 U.S. 15, rehearings denied, 346

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[1] Section 1346(b) of Title 28, United States Code, reads:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government, while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

U.S. 841, 346 U.S. 880, 347 U.S. 924; *Wheeldon* v. *United States*, N.D. Cal. 1960, 184 F. Supp. 81.

With the applicable law in mind we turn to the case before us, and the specific facts involved. We find them adequately, fairly and accurately stated in the memorandum opinion of the district court. We use and adopt a large portion of such memorandum opinion in the margin.[2]

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[2] "This is an action to recover damages from the United States of America under the provisions of the Federal Tort Claims Act (Title 28 U.S.C. §§ 1346 (b) and 2671 *et seq.*). The gist of the complaint is that certain Government agents failed and refused to perform obligations which the Government had assumed by virtue of contracts and commitments of certain agencies, in connection with certain dwelling units constructed by plaintiffs adjacent to the Sierra Ordnance Depot, a military installation of the United States, near Herlong, California. The complaint is in two counts. The allegations are substantially the same in both counts, except that in Count I, the defendant (the Government, through its agents and employees) is charged with wilful conduct, whereas in Count II, the defendant is charged with negligent conduct. Trial has been had on the issues raised by plaintiffs, and the Court is now called upon to resolve those issues.

The Sierra Ordnance Depot is located in a desolate and isolated area in the northeastern part of California. Prior to any of the activities which resulted in this action, a housing shortage existed at the Depot, which allegedly, threatened to impede the effective operation of the Depot. Because of this shortage, negotiations were carried on between the Department of Defense, Federal Housing Administration (FHA), and Housing and Home Finance Agency (HHFA, also a Federal agency) to obtain construction of some 456 dwelling units to house civilian and military personnel employed at the Depot. These units had originally been requested by the Commanding Officer of the Depot, and the request had been approved by the Headquarters of the Sixth Army (his superiors) and by FHA. These negotiations were carried on pursuant to the authority of the National Housing Act of 1934 (Title 12 U.S.C. § 1702), and of the Act of August 8, 1949 (Title 12 U.S.C. § 1748 *et seq.*), which required that the investment risks in such projects be undertaken by private enterprise.

The negotiations culminated in the issuance by the Defense Department, on October 24, 1951, of a certification to FHA that 125

The district court then considered the three communications between the Commanding General of the Sixth Army and the Commanding Officer of the Depot, dated January

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units were necessary to provide adequate rental housing for Depot personnel (both civilian and military); that the Depot was deemed a permanent installation; and that there was no present intention to substantially curtail activities at the Depot. The Depot Commanding Officer immediately repeated his request for an additional 300 units, based on prior study which had indicated that there were some 500 employees eligible for such housing. This request was denied, on the basis of Defense Department policy precluding a supplemental certification until the initial project was 25% or more completed. Since the need for housing was urgent and immediate, however, an additional 150 units were subsequently programmed by HHFA.

Thereafter, pursuant to statutory authority, FHA agreed to insure a mortgage on the original 125 units, in the amount of $1,113,700. Plaintiff Herlong Sierra Homes, Inc. (hereinafter Herlong) filed application, received approval, and undertook the construction of the original 125 units. A mortgage loan was secured from Manufacturers Trust Company of New York, refinanced by Manhattan Savings Bank of New York, and secured by a mortgage on the dwelling units to be constructed by Herlong. These units were authorized under Title VIII of the National Housing Act (the "Wherry Act"), and were completed and ready for occupancy in January, 1954 (having been completed in late 1953). Construction of these units was in accordance with specifications issued and approved by the Department of the Army and FHA, and Herlong agreed to reserve the completed units for rent to the personnel of the Depot (although apparently there was nobody else around in the area anyway). Rents were to be established by the Defense Department and FHA. During the period from June, 1954, to June, 1955, monthly costs in connection with the Title VIII units amounted to approximately $9,000.

Plaintiff, Builders Corporation of America, (hereinafter Builders) pursuant to a commitment from FHA to insure a mortgage of $1,261,300 for the 150 dwelling units programmed by HHFA, undertook construction of those units, also in accordance with specifications issued and approved by the Defense Department and FHA. Builders acquired a mortgage loan from California Bank of Los Angeles, secured by mortgages on each of the dwelling units. These mortgages were purchased by Federal National Mort-

13, 1954, April 28, 1954 and July 10, 1954, respectively (each in evidence herein as Plaintiff's Exhibits Nos. 19, 21 and 30).[3] The trial judge ruled the first two letters contained no direct or specific orders and were merely state-

gage Association. The units themselves were built under the authority of Title IX of the National Housing Act. They were not started, however, until the Title VIII units were substantially completed, and were not completed until late in 1954. Starting in July 1954, monthly payments on these units approximated some $8,000.

Probably the most important factor to plaintiffs in this program was the necessity that the projected units receive maximum occupancy. From a preliminary study, it was determined that 91% occupancy would be required in order for the units to meet their costs. In furtherance of this objective, a definite policy was set forth on the part of the Government, to encourage the maximum occupancy which would be required. Particularly was this policy enunciated on the part of the Government, in view of the fact that the Government had almost complete control of the sites, architecture, engineering, specifications, and inspections.

The Title VIII units were completed in late 1953, but at that time very few of the personnel at the Depot moved into the new units. This appears to have been an indication that the anticipated necessity for the Title IX units had been gauged over-optimistically. In any event, certain communications followed, from the Commanding General of the Sixth Army to the Commanding Officer of the Depot, Colonel Leavitt. It is upon these communications that plaintiffs base their claims. The precise nature of the communications is in dispute between the parties. This is the crucial issue to the case.

The basis of plaintiffs' claims is that they relied upon the communications (which they term "orders") by expending additional monies in housing construction, which they would not otherwise have done. With such a basis for their claims, it is obvious that there could have been, as plaintiffs themselves admit, no liability before those communications. The theory of plaintiffs' claims is that, by the communications, the Government voluntarily assumed a duty, and that reasonable care was required in its discharge.".

[3] Other letters containing similar language were sent to the Regional Director of the Housing and Home Finance Agency. Some were admitted in evidence; others refused admission.

ments of existing and future policy. We agree. The third letter the trial judge ruled was an order which directed certain things to be done, but which did not go so far as to order eviction of anyone from their then present housing. We need not pass on whether or not the July 10, 1954 letter was an order, in view of our disposition of other defenses. The trial judge ruled all the suggestions and orders had been followed and complied with by the officers so directed to act—that there was no "failure; either wilful or negligent, of government agents [specifically Colonel Leavitt and his staff] to carry out orders"—that all such orders so given were complied with.

We do not meet the question of what orders were given, or whether they were complied with. They all required Colonel Leavitt, in the chain of command he was then holding, to exercise some discretion. He was required by the position he held, for example, to notify his superior officer of the fourteen alleged deficiencies in the construction, as such deficiencies had been reported to him by those whom he was encouraging to use the housing accommodations. (Plaintiff's Ex. 25.) He was required, in his discretion, to determine whether certain key employees had to be available for telephone calls—day or night—and hence should not use the accommodations offered.

In *Dalehite* v. *United States*, *supra*, the Army's Chief of Ordnance was delegated to carry out the plan of producing a Fertilizer Grade Ammonium Nitrate (FGAN) by plants originally built in the United States to manufacture ammonium nitrate for explosives. The plants were operated by private companies, but under the supervision of the military. Army personnel were appointed for each camp. Negligence of all responsible for the production of FGAN was charged, resulting from the explosion of the French steamship, Grandcamp—with the leveling of the town of Texas City, and the death of thousands. The trial court found in favor of the plaintiffs, the court of appeals re-

versed, and that latter judgment was affirmed. The Supreme Court held the findings did not establish a case, and "that as a matter of law the facts found cannot give the District Court jurisdiction of the cause under the Tort Claims Act."[4]

We come to the same conclusion with respect to the matter now before us, for the same reasons set forth in *Dalehite* v. *United States*, *supra*, pp. 27-45.

Once the discretionary function is established as applicable to the facts—

> "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion." *Dalehite* v. *United States*, *supra*, pp. 35-36.

The Commanding General here, in whatever he requested or ordered, was exercising his discretion in attempting to encourage a policy of full and maximum use of the housing facilities available. We think Colonel Leavitt exercised his best judgment in what he did and how he did it. But whether he did or not, whether he was negligent or not; whether he abused *his* discretion, are all immaterial. The sovereign immunity of the United States

[4] 346 U.S. 15, at 24.

does not permit awards for damages arising out of acts performed by reason of the discretionary duty or function of "an employee of the government."[5]

The judgment in favor of the United States is *affirmed.*

(Endorsed) Opinion Filed Aug. 7, 1963.

FRANK H. SCHMID, *Clerk.*

APPENDIX B

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23 January 1954

AMENG-CPD 620/1516

Subject: Status of Wherry Housing Project

To: Commanding Officer
Sierra Ordnance Depot
Herlong, California

1. It has been called to the attention of this headquarters informally that the Wherry Housing Project at Sierra Ordnance Depot is not being occupied by personnel of the installation as the houses are completed. Specifically, this headquarters was advised that of the 30 houses available for occupancy, only 5 are tenanted.

2. Under AR 210-220 dated 8 May 1952 or predecessor directives, the installation commander is responsible for the initiation and development of the project and this headquarters is responsible for the review and analysis of the project request.

3. Paragraph 11b of AR 210-220 states in part that ". . . the army, in initially certifying to the FHA the need for this housing, has assumed a definite moral obligation and has keen self-interest in all housing projects to assure that all units are occupied within the allowed occupancy

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[5] *Cf.* 28 U.S.C. § 2680(a), *supra.*

factor for the individual project. Accordingly, it will be the direct responsibility of the installation commander to provide the mortgagor with a coordinated and aggressive program to assure maximum occupancy."

4. Attention is invited to letter, AGAO-C 600.12 (5 Oct. 50) G4, DA, TAG, 9 October 1950, subject: "Title VIII, NHA Housing Project—Sierra Ordnance Depot, California," copies of which are attached as Inclosure 1, wherein the Department of the Army sets for the certain premises to the approval of the 125 unit project. In paragraph 3 thereof it states in effect that the project required the eventual disposition of an equal amount of existing substandard housing.

5. It is desired that this headquarters be advised of the status of Wherry Housing at Sierra Ordnance Depot, the aggressive program adopted to assure maximum occupancy and other comment relating to this project.

For the Commanding General:

C. R. Alban
Capt. AGC
Asst Adj

1 Incl (dupe)
DA TAG Ltr 9 Oct. 50

Copy furnished:
Dist. Engr. SFran Dist CE US Army

APPENDIX C

AMENG-CPD 620/2006

Subject: Title VIII (Wherry) and Title IX Housing Projects, Sierra Ordnance Depot, Herlong, California.

To: Commanding Officer
Sierra Ordnance Depot
Herlong, California.

1. Reference is made to the Wherry Housing Conference held at Sierra Ordnance Depot on 6 April 1954. This headquarters expects no major difficulty in obtaining occupancy of the Title VIII and IX housing projects at Sierra Ordnance Depot. This is based upon:

a. The information presented and the conclusions reached at the above conference.

b. The anticipated early occupancy of the Title IX housing.

c. The early completion of landscaping and dust control by the sponsor at both housing projects.

However, in order to accelerate full occupany of these housing projects and to present maximum opportunity to those not able to afford the rents in the housing projects, it is desired that an income limitation commensurate with the size of the family be established on those who may occupy Government quarters.

2. In the event the above action does not bring about the desired results, steps should be taken to demolish certain of the temporary housing units, as was initially agreed upon and considered when housing projects were authorized at Sierra Ordnance Depot. In this regard, it is recommended that action for destruction of these units not be initiated prior to 30-60 days after beneficial occupancy is

obtained in the Title IX housing project, in order to have sufficient time to determine the occupancy pattern.

3. Attention is invited to additional suggested actions and procedures in obtaining occupancy in Wherry Housing outlined in letter, AGAC-C (m) 600.12 (23 Apr. 53) G4, The Adjutant General, DA, 28 April 1953, subject: "Programming and Management of Housing Projects Constructed under Title VIII, FHA (Wherry Act)" with 1 inclosure.

For the Commanding General:

APPENDIX D

AMENG 1 620 2006 (28 Apr. 54) 2d Ind.

SUBJECT: Title VIII (Wherry) and Title IX Housing Projects, Sierra Ordnance Depot, Herlong, California.

HEADQUARTERS SIXTH ARMY, Presidio of San Francisco, California. 10 Jul 54

TO: Commanding Officer, Sierra Ordnance Depot, Herlong, California.

1. A conference was held in this headquarters on 30 June 1954, attended by representatives of Builders Corporation of America (the sponsors), the California Bank of Los Angeles (the funding agency), the Federal Housing Administration, The Housing and Home Finance Agency, the Great American Bond & Indemnity Corporation, the Sierra Ordnance Depot, the San Francisco District Engineer and this headquarters.

2. The conference was initiated by this headquarters due to:

a. The deficiencies enumerated in preceding 1st Indorsement which influenced the renting of the Wherry Project.

b. The evident proximity of the builder sponsor to a financial crisis leading to bankruptcy.

c. The "moral obligation" and "keen self-interest" of the several echelons of the Department of the Army as set forth in paragraph 11b of AR 210-220 which embraces Sierra Ordnance Depot and this headquarters.

d. The possibility of a Congressional investigation into the elements which have contributed to delay in the completion of the housing, and other factors which may have been instrumental in not obtaining 93% occupancy at this time.

e. The integrity of the Commanders of the Sixth Army and the Sierra Ordnance who have certified, during the inception of this project that there are personnel attached to the installation of sufficiently high civil service grade and salary to warrant support of this project.

3. It was determined that, with one exception, none of the deficiencies set forth in preceding 1st Indorsement exists as of the date of the meeting. Further, that many of the deficiencies were of such a nature as not to warrant consideration by the conference. In this connection, your attention is invited to the complaint of low water pressure and maladjustment of the lighter on the gas ranges. It was stated by representatives of Sierra Ordnance Depot that upon opening up additional valves in the water system, pressure became normal and satisfactory. It was stated by representatives of the contractors that adjustments to the gas ranges were made as soon as complaints were registered.

4. The Secretary of the Army approved this project for an average monthly shelter rental of $74.41, including taxes, but without the garage charge. The comparable average rental now in effect is $72.22. Therefore the average basic shelter rental was not found to have been increased but, to the contrary, is somewhat lower.

5. Records in this headquarters and discussion in the conference fail to show the authorization for the charge of $6.50 for a garage. The representatives of the FHA stated that, in accordance with existing regulations, additions which affect the rental rates are not authorized unless concurred in by the installation commander. Section II, paragraph 6h(7) of AR 210-220, states: "Requests for changes by the mortgagor in the construction contract must bear written approval of a responsible military office . . . prior to submission to the local insuring office of the Federal Housing Administration." It would appear, in the absence of evidence to the contrary, that Sierra Ordnance Depot concurred in the addition of a garage to each of the houses for a monthly charge of $6.50. This raises the average basic rent from $72.22 to $78.72 per month.

6. This headquarters does not approve of the amount being paid by the tenants for a garage, but, in view of the apparent earlier concurrence by the installation, it is difficult, if not impossible, at this time to establish the fact that the monthly charge appears to be unreasonable.

7. The cost of utilities is not considered as rent, although their cost is a factor in living expense. Generally the utility charges for on-post housing are substantially lower than for equal service off-post or in Wherry Housing Projects. In an effort to equalize the latter services, this headquarters has recommended oil fired furnaces for space heating and electricity for water heating kitchen ranges and lighting. The record shows that the Sierra Ordnance Depot sponsored electricity for space heating in lieu of an oil fired furnace. The report will further show that, had the latter recommendation been followed, the cost of space heating would have been beyond the ability of the tenants to pay. The record shows that Lt. Colonel Ward C. Howard, ORDC, attended a meeting in the Engineer Section of this headquarters on 8 December 1952, at which time the relative merits and costs of utility supply were

discussed. It was decided to use liquid petroleum gas from a distribution system for space heating. The then Commanding Officer of the Sierra Ordnance Depot concurred in this determination and so notified the San Francisco Engineer by telephone.

8. The installation of individual L. P. gas systems was not approved by this headquarters because of the higher monthly cost, and because of the unsightly tanks. An effort is being made to determine who authorized the individual systems. If this change was not authorized by your headquarters, it is desired that copies of all correspondence and minutes pertaining to this subject be furnished this headquarters. It is believed that, in time, the system may be shifted to a distribution type with consequent reduction in monthly gas bills.

9. It was pointed out that a number of persons, not employed by the Department of the Army but rendering service to the installation, are living on post at greatly reduced rental.

10. The Secretary of the Army made a statement in his Letter of 9 October 1950 that this project requires the eventual disposition of an equal amount of existing substandard housing. The data contained on pages 34 through 55 of the Sierra Ordnance Depot Building Index sheets, dated January 1954, indicates that the economy of maintenance of the buildings is uneconomical and that they are not recommended for retention. The minutes of the initial Wherry meeting at the installation, dated 8 July 1950, stated that there was agreement that the existing housing is inadequate, that the turnover of personnel is largely due to inadequate housing, that this condition contributes to certain morale and welfare problems, that overcrowding is the cause of respiratory disease increase, and that a visit of the conference members confirmed that the housing units were substandard.

11. In light of the foregoing, it is desired that the following action be taken by your headquarters prior to 30 July 1954:

a. Establish an income limitation (with a sliding scale for dependents) above which a person may not occupy the present Government quarters.

b. Serve notice on tenants of Government quarters whose income is above the salary limit established as directed in sub-paragraph a above, that their quarters must be vacated not later than 1 September 1954.

c. Serve notice on tenants of Government quarters who are not employed by the Department of the Army but who are rendering services to the installation that, unless there is some contract or operating agreement which guarantees these persons on-post housing, their quarters must be vacated not later than 1 September 1954.

d. Select a total of 25 sets of sub-standard family quarters for disposal, prepare the necessary WD AGO Form 357, and forward forms to this headquarters by separate correspondence for transmittal to the Department of the Army.

e. Serve notice on the tenants of the quarters selected for disposal that, subject to the approval by the Department of the Army, they will be required to vacate the quarters on a 30-day notice.

12. Military personnel shall not be included in the action desired by preceding paragraph 11. A copy of this Indorsement is being forwarded to the Chief of Ordnance.

For the Commanding General:

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,315

BUILDERS CORPORATION OF AMERICA, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California Northern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

Filed and entered August 7, 1963.